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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-57

EDWIN L. WIEGAND CORPORATION,
Petitioner,

v.

WESTINGHOUSE ELECTRIC CORPORATION,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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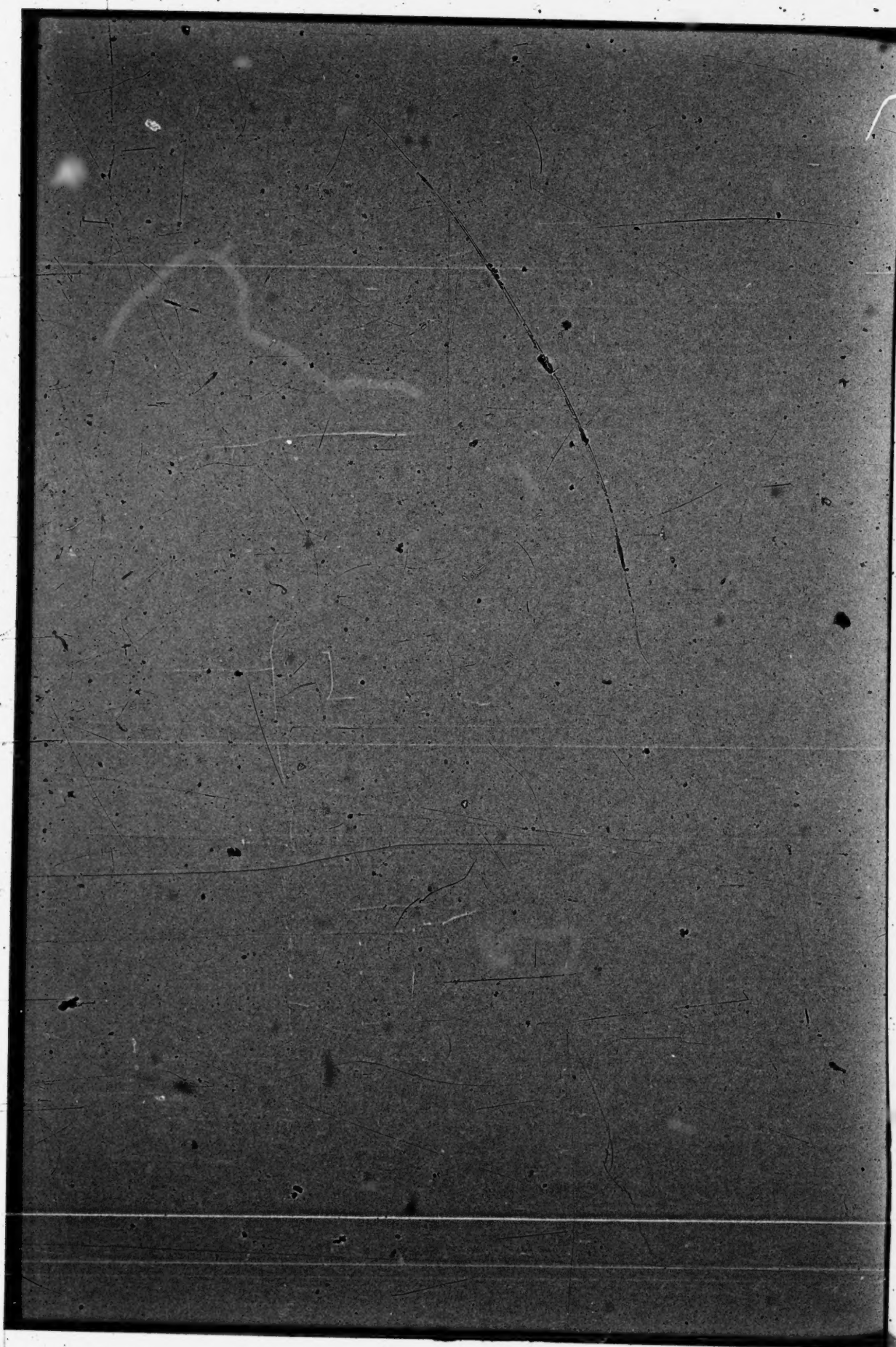

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Respondent, Westinghouse Electric Corporation, responds to the within Petition for Writ of Certiorari and urges that said Petition be denied.

OPINIONS OF THE COURT BELOW

The trial court in the principal cause held "that the conduct of Wiegand was the primary and efficient cause of the injury, i.e., that it was the sole, primary and proximate cause of the fire" and that Westinghouse was liable to plaintiffs for breach of implied warranty, only (pp. 19-20, Petitioner's Brief, Appendix A). The trial court then said that the cross-claims of the defendants would be "resolved upon motions or trial as may be found appropriate" (p. 20, Petitioner's Brief, Appendix A).

In resolving the cross-claims between the defendants for indemnity upon the Respondent's motion for summary judgment based on the Court's ruling in the principal cause, the trial Court granted Respondent's Motion, entered judgment over against Petitioner, and denied Petitioner's motions for new trial or to amend the findings of the Court (Appendix B, Petitioner's Brief). The trial Court held that the fundamental issues of liability of the two defendants had *to be* and were resolved in the principal cause, in which Petitioner had not demanded a jury, and Petitioner would not be allowed to relitigate them in a separate action on the cross-claims (p. 23, Appendix B, Brief of Petitioner). The Court having found the cause of the loss to have been Wiegand's component, and Westinghouse vicariously liable therefor, judgment over was granted to Respondent (p. 24, Appendix B, Brief of Petitioner).

The Sixth Circuit Court of Appeals affirmed "for the reasons set forth in the memorandum" of the trial court (p. 25, Appendix C, Brief of Petitioner).

GROUNDS ON WHICH JURISDICTION IS INVOKED

Respondent does not contest the jurisdictional statements in Petitioner's Brief, save to urge that certiorari not be granted herein.

COUNTER-STATEMENT OF QUESTION PRESENTED FOR REVIEW

Is it error for a trial judge in a non-jury product liability case to make findings of fact in a principal case in trial and to subsequently grant summary judgment based upon such findings of fact to one of two co-defendants who were actual adverse litigants in the principal trial notwithstanding a demand made by the defendant manufacturer of a component part of the product in question for jury trial as to cross-claims between the co-defendants, one of whom is the manufacturer of the finished product and one of whom is the manufacturer of a component part?

CONSTITUTIONAL AND RULES PROVISIONS INVOLVED

Respondent accepts the statement of Constitutional and Rules Provisions Involved as set forth by Petitioner (pp. 3-5, Petitioner's Brief).

COUNTER-STATEMENT OF THE CASE

Petitioner, manufacturer of a component part, and Respondent, manufacturer of the completed unit into which said component was incorporated, were co-defendants in the trial Court. Plaintiffs there sued the co-defendants for a fire loss allegedly caused by overheating inside a Westinghouse air conditioning unit. No jury demand was made by any party in the principal case.

However, Respondent cross-claimed against Petitioner for indemnity and/or contribution, and Petitioner cross-claimed back for indemnity only. It is important to note that Wiegand's cross-claim was for indemnity only, *not* for indemnity and/or contribution as stated by Petitioner at page 6 of Petitioner's Brief. (See pp. 27a-29a, Joint Appendix in the Sixth Circuit Court of Appeals.) Petitioner did demand a jury on the cross-claim only.

The cause proceeded to trial, non-jury, with the trial judge stating on the record:

> "After conference with counsel this morning before we recessed, the Court is of the opinion that the case in main should be tried and the matter of the cross-claims will either be disposed of by the decision in the case in main or in any event if it requires further proceedings will be tried separately." (p. 32, Appendix D, Brief of Petitioner)

Proceeding to trial, the trial Court found in its findings of fact that the sole cause of the fire was a defect in the heating element manufactured by Petitioner. Petitioner and Respondent were held jointly and severally liable, Petitioner for *negligent manufacture* and breach of implied warranty and Respondent vicariously liable for Peti-

tioner's defective element through breach of implied warranty.

Respondent moved for summary judgment over on its cross-claim for indemnity and said motion was granted for the reasons outlined above and contained in Appendix A, Brief of Petitioner. The trial Court, in effect, held that since Respondent was only vicariously liable to plaintiffs for Wiegand's fault, Respondent was entitled to indemnity as a matter of law and without the necessity for a further trial to determine facts already necessarily adjudicated in the principal action.

On appeal by Petitioner, the Court of Appeals for the Sixth Circuit affirmed the trial judge's opinion without discussion.

Petitioner now seeks a writ of certiorari from this Court to review the Sixth Circuit affirmance.

WHY CERTIORARI SHOULD NOT BE GRANTED

I.

The decision of the Sixth Circuit does not conflict with decisions of this Court.

Respondent respectfully submits that all cases submitted by Petitioner in support of its position that there is a conflict in the result herein with cases decided by this Court are entirely inapposite and completely distinguishable on their essential facts.

Beacon Theatres Inc. v. Westover, 359 U.S. 500; *Dairy Queen, Inc. v. Wood,* 369 U.S. 473, *Ross v. Bernhard,* 396 U.S. 531, *Meeker v. Ambassador Oil Co.,* 375 U.S. 160, and *Shubin v. United States District Court,* 369 U.S. 660, all

involve complex legal and equitable claims and causes of action not at all present here. *Beacon Theatres* and *Dairy Queen* present unique anti-trust questions not present here.

On the other hand, none of the cases cited present the facts critical herein:

1. Two separate legal actions, with a jury demand as to one only;
2. A trial by jury demand upon an indemnity action by a tortfeasor barred by law from recovering indemnity;
3. A cross-claim for indemnity by a defendant who cannot be liable vicariously, but who, if liable at all, must be a tortfeasor;
4. And a non-jury action in which the Court must, and in fact did, make specific findings of fact and law as between actually adverse parties in order to hold either of them liable.

The fact is, there is not even the most remote connection between the case at bar and the cases cited by Petitioner in its Brief herein.

Accordingly, Respondent respectfully submits that a grant of certiorari cannot be predicated upon such a fabricated "conflict" with decisions of this Court.

II.

There is no issue of first impression presented herein as contended by Petitioner

Petitioner seeks to set up a straw man and then to demolish him. There simply is no issue of a jury trial right in the case at bar.

We believe we are properly mindful of the cherished right to trial by jury. But, the fact is, that is a "straw man" in the context of the case at bar. Petitioner, very simply, elected to attempt to assert its defenses in the principal case to the Court and to then assert the same claims and defenses against its co-defendant, relitigate them if necessary, and, thereby, be in a position to pick the best of both worlds.

That this is so, we submit, is clearly shown by the following:

A. The trial court patently had to try the principal case (in which no jury was sought) first; otherwise, there would be no controversy before the Court between the two defendants for there would have been no liability;

B. The trial court, in the principal action, was plainly required to make critical findings of fact in order to find any liability at all to the plaintiffs and to assign that liability among the co-defendants upon the basis of vicarious liability (Respondent) and for negligent manufacture (Wiegand); otherwise both defendants would have had reversible error in their favor for failure to satisfy Rule 52(a) or the applicable substantive law of product liability.

C. Having failed to demand a jury trial in the principay action, and having actually occupied an adverse position to Respondent on those very issues necessarily critical as between the co-defendants, Petitioner could hardly then be heard to demand an opportunity to re-litigate the same issues, before a jury, in hopes of a different result.

That there is no legitimate, let alone first-impression, issue presented here, furthermore, is seen at once by examination of the matter as to which a jury was demanded. Petitioner demanded a jury on its cross-claim against Respondent. That cross-claim was for *indemnity only*, not for indemnity or contribution. (See cross-claim of Wiegand, dated October 6, 1969, pp. 27a-29a, Joint Appendix in the Court of Appeals.)

There is simply no way in which Petitioner, the manufacturer of a component part, could have indemnity against Respondent, the manufacturer of the completed unit. Respondent can and did claim indemnity from Petitioner where Respondent's liability rests on mere breach of warranty, or theoretically, even for negligent failure to detect a defect. Petitioner, on the other hand, cannot be liable on a vicarious basis. It can only be liable if it manufactured a defective heating element; and if it did manufacture a defective heating element, it is at best a joint tortfeasor (in this case, based upon the findings of fact, the sole tortfeasor) and it is barred from indemnity. Hence, there is no way under the facts of this case in which Petitioner would ever be entitled to indemnity from Westinghouse. Consequently, Petitioner's cross-claim for indemnity is completely spurious and can hardly form the basis for review through certiorari by this Court.

III.

The decision of the Sixth Circuit herein presents no uncertainty or ambiguity under Rules 42(b) and 52(a).

Respondent adopts by reference their discussion immediately above in response to Petitioner's third argument. Certainly even if the validity of the questions raised by Petitioner as to the workings of Rules 42(b) and 52(a) be conceded *ex arguendo,* this cause, presenting as it does a spurious cross-claim in any event, is not the context in which to consider them. However, interesting those questions might be, the simple fact is that at no time do they actually arise herein because under no circumstances could Petitioner have even had a legitimate cause of action for indemnity in this case. Accordingly, the questions are moot points from the outset in this litigation.

Quite beyond that fact, however, is the fact that herein it was obviously necessary for the trial judge to proceed as he did: determine the principal case with findings of fact, as both defendants requested, non-jury; and then proceed to a jury trial *if* the findings in the principal case warranted. That is precisely what he was requested by *both* defendants to do and precisely what he did do.

Petitioner's own illustrations of available alternatives (at p. 13, Petitioner's Brief) are illustrative of our point. Petitioner's Illustration #1 is a deficient alternative because the trial judge could not find liability to the plaintiffs unless he made supporting findings of fact to sustain it. Obviously he cannot then pretend he has made no findings and invite the jury to reconsider the same questions as if he hadn't already done so. Illustration #2 suffers the same deficiency, only more obviously requires that the

trial judge *not* make adequate findings to support his verdict.

Thus, under the circumstances of this case, and with a jury demand only as to a cross-claim for indemnity only, we submit the trial judge did exactly what he should have done and what the law requires him to do.

IV.

The Right to Trial by Jury.

As we have said above, we believe we are properly mindful of the sacred right to trial by jury. We have here, however, no case of that constitutional question. We have, instead, a defendant trying to pick the best of both the jury and the non-jury worlds.

The genius of our system of law lies in its ability to coalesce constitutional liberty with orderly due process according to law. That objective has been well-served, we believe, in the case at bar. That the end result was other than Petitioner desired does not give foundation to do otherwise. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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